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In The Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Our original Petition challenged the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*)[1] vacating the Federal Communications Commission's ("FCC") delegation to states to make impairment findings relating to landline telecommunications services and upholding the sections of the *Triennial Review Order ("TRO")* (*In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16798 (2003), corrected by *Errata,* 18 F.C.C.R. 19020 (2003)), dealing with line-sharing and hybrid-fiber (Broadband access to the Internet) which, in purporting to implement specific aspects of, 47 U.S.C. §251 and §252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), had the actual and practical effect of eviscerating Congress' pro-competitive vision that was embodied in these sections of the 1996 Act. The concern expressed in our Petition for Writ of Certiorari was that the court and agency actions below would have the direct effect of imposing higher prices and fewer choices on both residential and small business customers, with the resulting effect of damaging the economy of California, in particular, and the rest of the nation, in general.

This Reply Brief, in response to filings by Respondents, will demonstrate that competitive choices are dwindling for residential and small business customers in anticipation of the price hikes that will result when the FCC's *TRO* as modified and/or upheld by the court below becomes effective. Because of the pernicious effects that those provisions of the *TRO* that California has complained about (and that

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[1] Pets. *for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also, United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*).

the D.C. Circuit has upheld and/or vacated) are already having, it is imperative that this Court act quickly in granting certiorari in the instant case.

This Reply Brief will also correct the record regarding the Solicitor General's inaccurate statement that because no party raised the issue of preemption of state authority to set line-sharing rates before the FCC, the issue cannot be raised on judicial review of the *TRO*.

ARGUMENT

I. SWIFT ACTION ON THE PART OF THIS COURT IS NEEDED TO STOP THE HEMORRHAGING OF THE ONCE COMPETITIVE TELECOMMUNICATIONS MARKETPLACE.

This Court has recognized in its own decisions, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T*"); *Verizon Communications v. FCC*, 535 U.S. 467, 488 (2002) ("*Verizon*") and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct. 872, ___U.S.___ (2004) ("*Trinko*") that the 1996 Act has as its primary focus the promotion of widespread competition within the telecommunications marketplace. In this Court's most recent case, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct. at 875, quoting *Verizon*, 535 U.S. at 488, this Court held that the 1996 Act was intended to "uproot the incumbent LECs' monopoly and to introduce competition in its place." 124 S.Ct. at 875.

Notwithstanding this Court's clear pronouncements on the issue, the Respondents in this case have cynically undermined the purpose of Congress' legislative enactment of only eight years ago, as well as this Court's previous affirmations of Congress' political judgment. Respondents' interpretation of the 1996 Act defies all relevant precedent, the plain language of the 1996 Act and Congress' explicit intent in enacting the 1996 Act. Indeed, if this Court does not overturn the decision of the D.C. Circuit below, the competitive sections of the 1996 Act will have been effectively rendered meaningless, and the

stated goal of the 1996 Act (*i.e.*, "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"[2]) as well as the bulk of the pro-competitive sections of that Act, will be relegated to the status of an historical footnote in the history of telecommunications in the modern era.

Since the passage of the 1996 Act only eight years ago, the FCC, the states and this Court as well as other courts have attempted to set forth a rational and legal set of rules designed to permit competitive access to the incumbents' networks at cost-based prices. By 2003, large new competitors to the long-established Regional Bell Operating Companies ("RBOCs"), such as AT&T and MCI, were having success in reaching customers using the unbundled network elements ("UNEs") that allowed access to both traditional telephone services and more innovative broadband services. Residential and small business customers were reaping the benefits of reduced prices from both the RBOCs and their new competitors as a result of this competition.

It has been estimated that residential customers in SBC's territory in California saved between $345 million and $625 million in 2003 alone. See, *UNE-P Benefits Update: SBC's California Territory, 2004,* Yale M. Braunstein, School of Information Management Systems, University of California, Berkeley (May 2004). Other studies have concluded that nationwide, small businesses have saved over $4 billion in 2003 because of this competition. See, *CompTel/Ascent Analysis* (January 28, 2004). However, with the issuance of the *TRO* by the FCC and the D.C. Circuit's decision upholding the broadband provisions of that Order, and vacating other key provisions of the *TRO* relating to landline telephone service, the cost savings cited above are now in grave jeopardy.

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[2] See, Preamble of the 1996 Act.

In their misguided quest to promote a policy agenda that has the practical effect of turning the industry back to the 1980s, an era when the RBOCs held monopolies over residential and business telecommunications services, the FCC's Broadband holdings and D.C. Circuit's significant modifications to the *TRO* puts the economic future of consumers who are dependent on competitive services at risk. Now, in 2004, the FCC and the court below – in direct conflict with Congress' will to promote competition – have decided that their policy judgment to impose an effective monopoly for landline residential and some small business customers as well as a monopoly for Broadband in some areas of California and other states, and a duopoly in other areas, should take precedence over the clear language of the law. However, the language of the 1996 Act does not support this policy judgment, in any event, it is not the place of the D.C. Circuit to substitute its policy determinations for those of Congress. Such actions are simply not consistent with American legal precedent or the American public's perception of the judicial process.

The 1996 Act sought to encourage widespread competition in the telecommunications marketplace. In particular, the 1996 Act encouraged competition – *not* the exercise of de facto monopoly power – in areas where there are new innovative services, such as Broadband and access to Voice over the Internet. (See, 47 U.S.C. §157 (§706(c), *codified in* notes to this section.)) By granting California's Petition in this case, this Court has an opportunity to keep Congress' dream of competition and multiple choices for residential and small business customers alive and viable. This is a time of great turmoil in the telecommunications marketplace, and it is essential that this Court step in and bring order to the chaos.

The urgency which dictates that this Court should review this case is highlighted, for example, by AT&T's recent momentous announcement (*TR Daily,* June 23, 2004) that it is withdrawing from the residential market in many states, and its subsequent declaration that it may cease marketing wireline telephone service to new customers. Other, similar announcements have been made by

other carriers both large and small that are getting out of markets and/or radically cutting back their range of services in anticipation of the upcoming price hikes that will result when the FCC's *TRO* as modified by the court below is fully implemented. (See, *MCI Posts $71 Million Loss, Has Plan For Cash*, Business Section, Washington Post, August 6, 2004). FCC Commissioner Copps has stated in his dissent *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking,* CC Docket No. 01-338 ("*Interim TRO Order*"), that existing customers can expect at least a 15% increase in prices in the near future while new customers can expect increases as high as 300%. See, FCC Commissioner Copps' dissent, *Interim TRO Order*. These price increases will be economically untenable to consumers and carriers that have built their businesses based on the pro-competitive tenets of the 1996 Act.[3]

Such price hikes will have a particularly harmful effect on the customers of small businesses, which generate between two-thirds and three-quarters of all new jobs. Small business is, and necessarily will be, a larger part of the economic recovery anticipated over the next few years. Small businesses produce at least half of the private sector output. In metropolitan areas, a significant number of small business customers have access to innovative broadband services through competitive carriers. These services, in the past, were only available to larger business customers. Such access has clearly had a beneficial effect on improving productivity for these businesses. However, these benefits will soon end for a significant percentage of small businesses that will not be able to afford such

[3] In the area of line-sharing, the Solicitor General justifies the FCC action to eliminate line-sharing by claiming that a carrier can buy a whole loop and another data carrier can then split the data portion of the loop (line-splitting). However, if the major competitors of the RBOCs stop offering service to residential and small business customers, the line-splitting option will never be available to these consumers.

services when they are in the hands of an effective monopoly, which is subject to no significant regulatory oversight. Yet, such a socially unacceptable outcome will be the direct consequence of this Court's failure to overturn the ill-considered Broadband provisions of the *TRO*, and the decision of the D.C. Circuit modifying major parts of the *TRO*, that are at issue here. See, Dissent of Commissioner Copps, *Interim TRO Order*.

It should also be noted that the FCC's decision on June 9, 2004 not to seek review of the *USTA II* Decision occurred only after the Solicitor General sought an extension of time to file the FCC's Petition for Writ of Certiorari from May 31, 2004 to June 30, 2004. Immediately after the *USTA II* decision was issued and up to the time that the Solicitor General decided not to appeal this decision to this Court, a majority of the FCC (the *TRO* had passed on a 3-2 vote) indicated its desire to appeal the *USTA II* Decision. (See, FCC Press Release, *Statement of FCC Commissioners Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein on the D.C. Circuit's Decision to Eliminate the FCC's Rule*, March 3, 2004). Moreover, on June 3, 2004 the FCC's General Counsel on behalf of the majority of FCC Commissioners filed at the D.C. Circuit a "Reply to Opposition of the ILEC Petitioners to [the FCC's] Motion to Stay the Mandate pending the Filing of Petitions for Writ of Certiorari" ("Reply"). The FCC begins the Reply by stating the following:

> "In our motion to stay the mandate in this case pending the filing of petitions of certiorari, we demonstrated that this Court's decision presents substantial legal questions meriting further review in light of Supreme Court rulings recognizing the Commission's broad authority to implement the 1996 Act. We also showed that issuance of the mandate will not only place substantial burdens on federal and state regulators, but it will have an immediate and wide-ranging impact on competition in local exchange markets – effects that will prove entirely unnecessary in

> the event the Supreme Court grants review and reverses. . . .
>
> The ILECs do not dispute that the issues at stake have tremendous national significance. If the mandate were to issue, the ILECs would no longer be bound by the Commission's unbundling rules . . . they would be free to argue that they may provide or withhold elements as *they see fit*, and not as the statute or the Commission's rules require." Emphasis added.

Finally, the FCC states in its concluding paragraph of the Reply that the question it planned to raise to this Court was the following:

> "FCC will ask the Supreme Court to resolve . . . whether it was reasonable for the FCC to conclude that mass market switching and dedicated transport must be unbundled and made available as elements pursuant to section 251(c)(3)."

Six days later, in a rather dramatic reversal of this position, FCC Commissioner Kevin Martin, the major force behind the *TRO*, after receiving political input from the current Administration (See, *Statement of Acting NTIA Administrator Michael D. Gallagher on Solicitor General's Decision not to Appeal D.C. Circuit Decision*, dated June 9, 2004) and the Solicitor General's announcement on June 9 that his office would not appeal this decision on behalf of the FCC, changed his mind regarding the FCC pursuing an appeal to this Court (See, Statement *FCC Commissioner Martin*, dated June 9, 2004). Thus, a new majority emerged at the FCC and a decision was made not to appeal those provisions of the *TRO* that the *USTA II* decision had vacated.

As a result of this decision, the FCC issued the *Interim TRO Order* attempting to comply with the D.C. Circuit's *USTA II* decision in the many significant areas where the D.C. Circuit overturned the FCC's *TRO*. This *Interim TRO Order* has the stated purpose of implementing the requirements mandated by the *USTA II* decision in

a legal and somewhat rational process. Notwithstanding this effort by the FCC to set up some form of a reasonable process for moving forward to comply with the D.C. Circuit's order, the RBOCs, anxious to take full advantage of their "victory" in the court below, filed a Mandamus Petition with the D.C. Circuit the day after the *Interim TRO Order* was issued, requesting that it vacate the FCC's *Interim TRO Order* and retain jurisdiction under the assumption that the FCC is incapable of complying with the requirements of the court below.

In their Mandamus Petition, the RBOCs assert that the FCC has essentially granted itself an extension of time to implement what the D.C. Circuit ordered in *USTA II*. The RBOCs demand the FCC produce an impairment finding during the next four months whether or not a record to support such a finding has been developed, and whether or not basic due process procedures have been followed. The RBOCs have threatened to ask the court below to rule that, if the FCC does not produce impairment findings in the next four months, in what essentially would be final rules, it be deemed that there is no impairment with regard to switching, dedicated transport, and enterprise loop. The RBOCs' Mandamus Petition also requests that the *USTA II* decision be made binding on the states. See, RBOCs' Petition for Mandamus to Enforce the Mandate of this Court, Nos. 00-1012 *et al.*

Given that under the original *TRO* rules, California along with 31 other states spent innumerable hours and close to nine months developing records based on which impairment findings could be made under the provision of the *TRO*, the RBOCs are in effect asking the court below to force the FCC to make judgments based on little or no evidence, thereby grossly violating the due process rights of consumers and competitors alike. On September 1, 2004 the D.C. Circuit ordered the FCC to respond within 15 days to the allegations in the RBOCs' Mandamus Petition. See, *USTA v. FCC* (No. 00-1012) (D.C. Cir. 2004).

The RBOCs' efforts plainly are intended to force a regulatory result on the entire American public that serves only the interests of the RBOCs, and that effectively guts any real competition in one of the largest markets (California and the rest of the states) for telecommunication services in the world. The result would be entirely at odds with the express language of Congress in the 1996 Act that specifically seeks *greater* competition for the provision of such services. It is also astonishing that the FCC has effectively knuckled under to political pressures supporting such an unbalanced regulatory result. Finally, it is most egregious of all that one of our nation's highest and most respected courts, in its *USTA II* decision, has shown such little regard both for the clear expression of Congressional intent and for this Supreme Court's own holdings interpreting and applying that intent. See, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 371; *Verizon Communications v. FCC*, 535 U.S. at 488 and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct at 875.

It is in this atmosphere of regulatory confusion and blatant disregard for the law of the land by the FCC, the RBOCs and the court below that the State of California and the California Public Utilities Commission implore this Court to take action on this case in an expedited manner.

II. THE SOLICITOR GENERAL INACCURATELY STATES THAT BECAUSE NO PARTY RAISED THE ISSUE OF PREEMPTION OF STATE AUTHORITY TO SET LINE-SHARING RATES BEFORE THE FCC, THE ISSUE CANNOT BE RAISED ON JUDICIAL REVIEW OF THE *TRO*.

The Solicitor General's brief asserts that because no party raised the issue of preemption of State authority to set line sharing rates before the FCC, that issue cannot now be raised on judicial review of the *TRO*. However, the Solicitor General deceptively fails to note that in the

proceeding below, the FCC gave no clear indication that it would adopt a three-year phase-out plan for line-sharing or that it would purport to directly preempt State authority to set line-sharing rates. Consequently, California and other parties had no opportunity to comment to the FCC on the legality of such a plan. Furthermore, under 47 U.S.C. §405, California and other parties are not obligated to file a petition for reconsideration as a condition precedent to seeking judicial review of an FCC order. It should also be noted that, while the Solicitor General may consider this issue to be of little importance, it was of great importance to Congress when it gave States such authority, and remains of great importance to State commissions who represent the hundreds of millions of American consumers in all 50 states. That the D.C. Circuit failed to discuss the issue in the *USTA II* decision suggests a lack of attention by the court to the interests of the average telecommunications user rather than a genuine pronouncement on the legitimacy of the States' legal argument.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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